FANNING, PHILLIPS & MOLNAR

CONTRACT NO. V526P-3108 **VABCA-3964E**

VA MEDICAL CENTER
BRONX, NEW YORK

Gary A. Molnar, P.E., Principal, Fanning, Phillips & Molnar, Ronkonkoma, New York, for the Appellant.

Paul A. Embroski, Esq., Trial Attorney; ***Charlma Jones, Esq***., Deputy Assistant General Counsel; and ***Phillipa L. Anderson, Esq*.,** Assistant General Counsel, Washington, D.C., for the Department of Veterans Affairs.

OPINION BY ADMINISTRATIVE JUDGE ROBINSON

Fanning, Phillips & Molnar (FPM, A/E or Applicant) has submitted a timely application in accordance with the *Equal Access to Justice Act* (*EAJA* or *Act*), 5 U.S.C. § 504, to recover its costs of litigating the underlying appeal. The Board's decision is reported at 96-1 BCA ¶ 28,214. Familiarity with our decision is presumed.

The Applicant asserts that it meets the eligibility requirements of the *EAJA* with respect to its net worth and number of employees, and has provided us with adequate supporting evidence in that regard. The Department of Veterans Affairs (VA or Government) has not challenged that assertion. The Board finds that FPM is eligible for consideration of an award under *EAJA*.

The Applicant achieved the relief which it sought in VABCA No. 3964, and contends that it is *prevailing party*, a position with which the VA does not take issue. We find the Applicant to be a *prevailing party*.

The Contracting Officer (CO) withheld portions of money earned by FPM in connection with both the Emergency Reservoir design and the Cool Storage Feasibility Study. The reason for retaining the design funds was ostensibly as leverage to compel a redesign by FPM, and was permitted by the terms of the Contract. However, because the VA terminated the contract with FPM, there was no longer the possibility that the design would be reworked by FPM under any foreseeable scenario. Furthermore, once the CO agreed to convert the default termination to one for the convenience of the Government, it lost any claim to retain the money in connection with a possible reprocurement. At that point, the CO should have released the balance of the previously-earned design money to its A/E.

Although the VA encountered several problems in attempting to have the study accepted by Consolidated Edison (Con Ed), it failed to persuade the Board that any of these deficiencies or shortcomings were attributable to FPM's failure to comply with terms of the Contract. Instead, the record supported the A/E's contention that the VA and/or Con Ed required services beyond the scope of the Contract. When FPM proposed to perform the additional services for a fee, the VA was not responsive. Instead, it simply

retained the unpaid portion of the fees already earned by its A/E.

The referenced withholdings were without any reasonable contractual basis. As such, the position of the Government was not substantially justified. The Board does not wish to penalize the VA for having agreed, in the spirit of compromise, to settle its default claim against FPM. However, once the default had been converted to a convenience termination, and particularly after the A/E had demanded release of the money earned, it was incumbent upon the CO to respond to that demand with a reasoned analysis of the VA's right to continue holding the money. There is no indication that any such analysis was performed.

The underlying appeal, VABCA No. 3964, consumed only a portion of Applicant's overall litigation efforts. It was consolidated with VABCA No. 3586, which is not currently before us. Because of this, the Applicant has suggested an apportionment consistent with the actual amount of money at issue in the underlying appeal. While the total claimed in VABCA No. 3964 was $11,351.90, the amount sought in VABCA No. 3856 was $49,741.31. The Applicant's proposed formula is explained as follows:

> Where certain tasks were co-mingled with VABCA-3856, it is proposed to use a direct proportion to the amount of claims. Thus, the proportion allocable to VABCA-3964 would be:
>
> $11,351.90 ÷ (11,351.90 + 49,741.31) = 18.58%

The Government has not objected to this apportionment formula. The Board will accede to the Applicant's suggestion in this regard.

The Applicant has requested reimbursement for the following types of fees and expenses allegedly incurred in connection with VABCA No. 3964: 1) for eight named FPM employees (engineers, draftsmen & secretaries), the total of wages paid for all hours worked on *both appeals* was shown as $7,695, which has been apportioned at 18.58% (**$1,429.79**), for this appeal only; 2) for the salary paid to Gary Molnar, a principal of the firm, for 107.7 hours plus overhead and profit (**$14,878.63**); 3) for the salary, plus overhead and profit, of an FPM employee who performed clerical and secretarial services for Mr. Molnar (**$3,023.66)**; 4) for "Other Fees and Expenses" as follows:

Item	Amount
H. P. Fritz, Esq.	$2,000.00
Travel (Errichiello)	51.75
Long Distance	18.50
Overnight Delivery	138.53
Total	$2,208.78

Total, VABCA-3964 @ 18.58% **410.39**

With the exception of services rendered by H. P. Fritz, Esquire, all of the work for which reimbursement is sought was done by the Applicant's own employees.

Because the *EAJA* is a surrender of sovereign immunity, it must be strictly construed. ***Fidelity Construction v. United States***, 700 F.2d 1379 (Fed. Cir. 1983), *cert. denied*, 464 U.S. 826 (1983). The *Act* speaks only of "reasonable attorney fees." As such, the courts have limited recovery of attorney fees to fees paid individuals licensed to practice law. ***Naekel v. Department of Transportation***, 845 F.2d 976 (Fed. Cir. 1988); ***Merrell v. Block***, 809 F.2d 639 (9th Cir. 1987); ***Crooker v. Environmental Protection Agency***, 763 F.2d 16 (1st Cir. 1985). Consistent with these judicial holdings, the boards have held that an appellant who appears without benefit of counsel is not entitled to reimbursement for the salaries paid to its officers or employees in connection with such *pro se* representation and prosecution of its appeal. ***Preston-Brady, Inc.***, VABCA No. 1992E, 88-1 BCA ¶ 20,446; ***M. Bianchi of California***, ASBCA No. 26362 *et al*, 90-1 BCA ¶ 22,369 at 112,404; ***J.V. Bailey Co., Inc.***, ENG BCA No. 5348-F, 91-3 BCA ¶ 24,350; ***J. J. Seifert Machine Co., Inc.***, ASBCA No. 41398, 92-1 BCA ¶ 24,608.

The reasoning employed in the above-cited cases and appeals has been likewise applied to preclude reimbursement for the salaries paid to Applicant's employees who furnish what would be characterized as "litigation support services." ***Danrenke Corp.***, VABCA Nos. 3601E *et al.,* 94-1 BCA ¶ 26,504; ***Labco Construction, Inc.***, AGBCA No. 95-104-10, 95-2 BCA ¶ 27,677. Only fees paid to outside consultants or independent expert witnesses qualify for reimbursement. Neither lay witness fees nor salaries paid to employees who do consultative work or appear as expert witnesses can be recovered under the *EAJA*. ***Danrenke Corp.***; ***Quality Diesel Engines, Inc.***, GSBCA No. 11237-C *et al*., 91-3 BCA ¶ 24,331 at 121,567-68. In light of the above, the Board cannot reimburse the Applicant for any of the salaries which it paid its officers and employees, no matter what involvement they may have had with the litigation of the underlying appeal.

The remaining category for which Applicant seeks reimbursement is termed "Other Fees and Expenses." The substantiation for the $2,000 fee paid to an attorney, H. P. Fritz, is his bill for services and the Applicant's check for payment of same. The Fritz bill, dated August 1, 1994, contains the following statement: "For all consultation services rendered through 2/1/94 including legal research and miscellaneous correspondence and communications." There is no itemized breakdown of these legal services. Neither is there information on the dates when they were rendered and the hourly rate charged. The prorated recovery which Applicant seeks in connection with the underlying appeal is $371.60 (18.58% of $2,000).

Since there is neither itemization nor any *starting date* for these services, and because Mr. Fritz never entered an appearance on behalf of FPM, the Board is unable to determine whether the fees were reasonable or to what extent they were rendered *after* the appeal process before the Board had begun. We have previously held that *EAJA* fees are only recoverable for legal work done in that connection. ***Industrial Refrigeration Service Corp.*** VABCA No. 2532E, 93-1 BCA ¶ 25,291. Moreover, because FPM had filed several other appeals with the Board which were later withdrawn, we cannot tell whether the Fritz bill is *only* for work in connection with the two appeals which were litigated. It is for these very reasons that the Federal Circuit has held that simply billing for a total number of hours is inadequate. An Applicant *must specify* the tasks performed and the hours associated therewith. ***Naporano Iron & Metal Co. v. United States***, 825 F.2d 403 (Fed Cir. 1987*), citing* ***Hensley v. Eckerhart***, 461 U.S. 424 (1983). We recently discussed the minimum requirements for specificity which this Board will accept from an

applicant. ***Integrated Clinical Systems, Inc. (American Monitor Corporation)***, VABCA No. 3745E *et al*, 1996 WL 403380 (7/15/96).

In its Answer, the Government took issue with the lack of any meaningful explanation or itemization of the legal services rendered by Fritz. The Applicant made no effort to provide additional documentation. It simply responded that any itemization, "further than identifying [these legal services] as 'consultation,' would, in and of itself not be cost productive and hence, not in the best interests of these judicial proceedings." Because of the Applicant's refusal to explain the nature and extent of these legal services in the detail required by the *Act*, we will not award any portion of the fees paid to attorney Fritz.

The prorated express delivery charges appear to be reasonable and are allowed. This Board has previously held that reimbursement for these types of costs is equally available to parties acting *pro se* as are similar costs incurred by attorneys. ***Preston-Brady Co., Inc.***, 88-1- BCA at 103,391-92, *citing* ***Oliveira v. United States***, 827 F.2d 735 (Fed Cir. 1987) and ***Merrell v. Block***; ***Fletcher & Sons, Inc.***, VABCA No. 3248E, 93-1 BCA ¶ 25,472. We will utilize the Applicant's apportionment formula, allowing the cost of overnight express delivery, calculated as follows: $138.53 x 18.58% = **$25.74**.

Both the travel and long distance telephone costs were incurred by Mr. Errichiello, also a salaried employee of the A/E. This individual offered expert testimony pertaining to several of the issues involved in VABCA No. 3856, particularly with respect to the accuracy of the A/E's construction cost estimate. In its Response, the Government asserts that Mr. Errichiello's testimony was not pertinent to the issues involved in the underlying appeal. We disagree. The dispute in VABCA No. 3964 involved the A/E's demand that retained money be released, and the VA's refusal to do so. To a large extent, the VA justified its withholding of amounts which the A/E otherwise earned by citing its failure to receive any responsive bids which were within the A/E's construction cost estimate. The testimony of Mr. Errichiello, as well as of the VA's expert witness, was thus germane to VABCA No. 3964 as well as to VABCA No. 3856. The question of the reasonable approach to such construction cost estimating permeated both appeals, as was evidenced by the efforts devoted by both parties. The Applicant is entitled to recover reasonable costs incurred by Mr. Errichiello in connection with his preparation and testimony for VABCA No. 3964. The costs incurred by Mr. Errichiello in long distance calls to suppliers for price quotes ($18.50), as well as his travel expenses ($51.75), appear to be reasonable. They have not been challenged by the Government, except as otherwise noted. The apportioned total is as follows: $70.25 x 18.58% = **$13.05**.

DECISION

For the reasons given, the Applicant may recover only the apportioned costs of overnight express delivery, long distance calls and necessary travel, for a total of **$38.79**. All other amounts claimed are disallowed.

DATE: **August 22, 1996**

JAMES K. ROBINSON
Administrative Judge
Panel Chairman

We Concur:

GUY H. MCMICHAEL III
Chief Administrative Judge

MORRIS PULLARA, JR.
Administrative Judge